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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 576

FINSTERWALD FURNITURE COMPANY,
a Delaware corporation,
Petitioner (Defendant and Appellant below),
vs.
FINSTERWALD CLOTHING COMPANY,
a Michigan corporation,
Respondent (Plaintiff and Appellee below)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JASON L. HONIGMAN,
Attorney for Finsterwald Clothing Company, Respondent,
2003 Dime Bank Building,
Detroit, Michigan.

MILTON J. MILLER,
Of Counsel.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
I. Introductory Statement	1-3
II. Counter-Statement of Case	3-9
III. Argument	10-16
A. There is no conflict between the instant decision of the Sixth Circuit Court of Appeals and the law of Michigan	10-12
B. There is no conflict between the instant decision of the Sixth Circuit Court of Appeals and the decisions of other Circuit Courts of Appeal	13-16
IV. Conclusion	16

TABLE OF CASES CITED

Amer. Washboard Co. v. Saginaw Mfg. Co. (C. C. A. 6, 1900), 103 F. 281	14
Annheuser Busch, Inc. v. Budweiser Malt Prod. Co. (C. C. A. 2, 1923), 295 Fed. 306	15
Bell v. Service Coal Co., 280 Mich. 172, 273 N. W. 435 (1937)	11
Dayton v. Imperial Sales, etc. Co., 195 Mich. 397, 161 N. W. 958 (1917)	12
Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 110 P. 23 (1910)	12
Esso Inc. v. Standard Oil Co. (C. C. A. 8, 1938), 98 F. (2) 1	12
Fidelity Bond & Mtg. Co. v. Fidelity Mtg. Co. (C. C. A. 6, 1926), 12 F. (2) 582	14
Foster Canning Co. v. Lardan Packing Co., Inc., 17 N. Y. Supp. (2) 583 (1939)	12

Page

France Mill. Co. v. Washburn Crosby Co. (C. C. A. 2, 1925), 7 F. (2) 304 15
G. & C. Merriam Co. v. Saalfield (C. C. A. 6, 1912), 198 F. 369 14
Gleaves v. B. W. Fishburn Co. (C. C. A. 5, 1936), 82 F. (2) 627 13
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 60 L. Ed. 713 (1916) 12
Horlicks Malted Milk Corp. v. Horluck's Inc. (C. C. A. 9, 1933), 59 F. (2) 13 13
Lamb Knit Goods v. Lamb Glove & Mitten Co., 120 Mich. 159, 78 N. W. 1072 (1899) 12
Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 P. 480 (1900) 12
Pease v. Scott County Milling Co. (D. C. Mo. 1925), 5 F. (2) 524 12
Peoples Outfitting Co. v. Peoples Outlet Co., 170 Mich. 398, 136 N. W. 599 (1912) 12
Phillips v. Governor & Co. (C. C. A. 9, 1935), 79 F. (2) 971 15
Queen Anne Candy Co. v. F. W. Woolworth Co., 165 Wash. 143, 4 P. (2) 844 (1931) 12
Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595 (1906) 12
Schwanneke v. Genesee Coal & Ice Co., 262 Mich. 624, 247 N. W. 761 (1933) 11
John B. Stetson Co. v. Stephen L. Stetson Co. (C. C. A. 2, 1936), 85 F. (2) 586 13
Tillman & Bendel Inc. v. Calif. Pack. Corp. (C. C. A. 9, 1933), 63 Fed. (2) 498 15
Traffey v. McIlheny Co. (C. C. A. 5, 1922), 281 Fed. 23 15
Treager v. Gordon-Allen Ltd. (C. C. A. 9, 1934), 71 F. (2) 766 ..... 12, 15

Page

United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90, 63 L. Ed. 141 (1918) 12

Upjohn Co. v. Wm. S. Merrell Chem. Co. (C. C. A. 6, 1920), 269 Fed. 209 15

Western Auto Sup. Co. v. Knox (C. C. A. 10, 1937), 93 F. (2) 850 12

Young & Chaffee Furn. Co. v. Chaffee Bros. Furn. Co., 204 Mich. 293, 170 N. W. 48 10

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Respondent (Plaintiff and Appellee below)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTORY STATEMENT

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

This Brief is submitted on behalf of the respondent, Finsterwald Clothing Company, a Michigan corporation, in opposition to the granting of the Petition for Writ of Certiorari filed in this cause.

This case concerns a question of unfair competition in the use of trade-names, involving two large retail estab-

lishments doing business in Detroit, Michigan. The instant suit was brought by respondent in the Chancery Court of the State of Michigan to procure protection from unfair competition occasioned by petitioner's attempted entry into respondent's line of business under a similar trade-name. The suit was transferred to the Federal District Court of Michigan by petitioner by reason of diversity of citizenship, petitioner being a Delaware corporation (13). The Federal District Court granted injunctive relief to respondent, and its decree was affirmed by the Sixth Circuit Court of Appeals (391-3, 409).

In this field of litigation, as petitioner admits, "each case is determined upon its own facts" (Petition, p. 19). The basic question in the Lower Court thus was whether the evidence and proofs introduced presented a case justifying relief for plaintiff, respondent herein. Based on the voluminous proofs in this case, specific and detailed findings of fact were made by the lower Court which constituted the basis for the relief granted (357-63). In seeking to review the decision herein, petitioner undertakes to review the facts of the instant case upon assertions that are contrary to the factual findings of the lower Court. We respectfully refer this Honorable Court to the comprehensive fact findings of the lower Court (357-63, 397-8), which, we submit, should be binding upon petitioner when it seeks to review this case upon a Petition for Certiorari.

Once the factual basis of the instant decision is accepted, the legal problem involved is neither a novel one nor does it involve any extraordinary principles of law. Inasmuch as the sole issue herein involved the business conduct of concerns located solely within the State of Michigan, it was conceded by petitioner, both in the District Court and the Circuit Court of Appeals, that this case must be governed by the law of Michigan. In making its decision, the lower Court specifically pointed to Michigan cases appli-

cable to the facts of the instant case, warranting the relief granted to respondent (364, 371-2).

We submit that there are no important problems of public interest involved in the instant case, warranting its review by Certiorari by this Honorable Court. At most there is presented herein a problem of purely local interest to two retail concerns doing business in Detroit, involving primarily a factual determination to which was applied well-established principles of the Michigan law of unfair competition, warranting the relief decreed by the lower Court.

II. COUNTER-STATEMENT OF CASE

Because of petitioner's utter failure to present the basic facts upon which the decision in this case was based, respondent feels it necessary to present herein a short counter-statement of facts, as supported by the fact findings of the trial court.

This suit was brought in equity by respondent to enjoin unfair competition in the use of a trade-name (3-11). Respondent and petitioner companies each have large downtown stores in the City of Detroit, in which they have for years carried on a city-wide retail business, with the respondent selling men's clothing and the petitioner selling furniture and home furnishings (396-7), each concern being generally known to the public as "Finsterwald's" (360, 89, 90, 95, 109, 175, 260-1, 284, 292-3, 330, 335, 337).

The respondent, Finsterwald Clothing Company, and its predecessors have been continuously engaged in the sale, at retail, of men's clothing in Detroit since 1898 under the *Finsterwald* name (357-8, 23). The business had been founded by Adolph Finsterwald, who, together with three

sons and a nephew of the same name, still continue to operate its business and own substantially all of its stock (23). Respondent's business has been highly successful through the years, and at present, it operates, in addition to its downtown store, three branch stores located in various sections of the City of Detroit (363, 25, 36).

Some ten years after Adolph Finsterwald founded the Finsterwald Clothing Company, his brother, Herman Finsterwald, commenced a retail furniture and home furnishings business under the name of "Finsterwald Furniture Company," the successor corporation of which is the petitioner in the instant case (15-16). Since 1933, however, no one by the name of "Finsterwald" has been connected with the petitioner corporation (45, 225).

Since 1910, the two concerns operated in the City of Detroit in their separate fields, at one time side by side, and at present, separated by only a few City blocks, the respondent selling men's and boys' clothing, and the petitioner selling furniture and home furnishings (28, 358). In recent years, the petitioner's business was unprofitable (363, 75, 256), and on three different occasions between 1935 and 1937, the petitioner sought from the respondent permission to engage in the clothing business under the *Finsterwald* name (30-32, 34-5, 167, 171). On each occasion, the respondent objected strenuously (32, 35, 167-70, 353-5), and petitioner desisted from entry into the clothing field, but in February, 1939, the petitioner undertook to enter into the clothing field, this time without asking for respondent's consent (169-171).

Respondent immediately brought this suit, praying for injunctive relief on the ground that if petitioner were permitted to enter into respondent's line of business, under the *Finsterwald* name, the Detroit public would be con-

fused and unable to adequately distinguish between the two concerns, with the necessary result that the petitioner would usurp for itself a substantial part of respondent's long-established good-will in the men's clothing business. A Special Master took the proofs and rendered an exhaustive Report, containing specific and comprehensive findings of fact and law, upholding the contentions of respondent and recommending the granting of injunctive relief to respondent (357-382). The Master's Report was adopted by the Honorable District Judge, who, himself, rendered a lengthy and careful opinion (394-405). From the decree of the District Court (391-3), an appeal was taken by petitioner to the Sixth Circuit Court of Appeals, which thereafter affirmed the decision of the lower Court (409).

The ultimate conclusion of fact arrived at by the Special Master and the District Court was that if petitioner were allowed to enter into the clothing business under the *Finsterwald* name, there would be a substantial confusion in the public mind as to the identity of the two *Finsterwald* concerns which would result in the usurpation by petitioner of respondent's long established good-will in the men's clothing business (363, 366, 397-8). This conclusion of fact was arrived at after full consideration of the voluminous testimony presented by each side during the trial of this case.

That testimony showed that despite the minor distinguishing words in the two names, namely "clothing" and "furniture," the master or dominant word in the name of both respondent and petitioner was the single word *"Finsterwald"* (360, 78, 187, 198, 291-2, 328-30). It was clearly established that it was the word *"Finsterwald"* in each of the two names that fixed the identity of the two concerns in the minds of the public, and the Special Master found that each of the concerns, as a matter of fact, was

widely known to the public only as *"Finsterwald's* (360, 89-90, 95, 109, 175, 260-61, 284, 292-3, 330, 335, 337). Throughout the years of their existence, both concerns generally identified themselves to the public as *"Finsterwald's,"* rather than by their full corporate names, both in their advertising, which was very extensive (357-60, 25-8, 172-80, 258-9, 351-352(26), 352 (41)-352 (65), and in the signs outside and inside their buildings (360, 352, 28-9, 32).

In substantiation of the fact that the two concerns were indistinguishable to a substantial portion of the public were the proofs showing that, even though the two concerns had theretofore been engaged in the widely separate retail fields of clothing and furniture, there was nevertheless a widespread impression among the public that the concerns were connected, many even believing that there was an identity of ownership and management (361, 30, 39, 45, 85-6, 89, 92-3, 96, 103, 105, 106, 109, 114, 116, 240). The proof further showed that great numbers of people entered the premises of the one concern believing that they were in the store of the other (360, 85, 88, 92, 95, 97, 99, 101, 107, 114-16, 117-18, 241). The public daily showed substantial confusion in dealing or contacting the wrong concern in the mailing or delivery of checks (360, 92, 99, 108), making of purchases (360, 39, 85, 88, 92, 95, 97, 99, 101, 107, 114-16, 117-18, 241), payments on charge accounts (92-3, 95, 97, 99, 101, 106), giving of credit references (85-6, 87-8, 98), delivery of merchandise (29, 99, 100, 102, 108), and making of telephone calls and delivery of mail (360, 29, 46-7, 104-5, 108-9). That this confusion would greatly increase if petitioner were allowed to enter, under the *Finsterwald* name, into the same line of business as respondent, namely, the men's clothing business, was the finding of the lower Court based on the testimony of many witnesses (366, 184-5, 196-8, 286, 329).

Based upon the proofs before them, the Special Master and the District Judge found as a fact that if petitioner were allowed to go into respondent's line of business under the *Finsterwald* name, much of the men's clothing business and good will of the respondent would go to the petitioner by reason of the confusion of the public (363, 366, 397-8, 404). From the facts before them, they found that a substantial portion of the public would not be able to distinguish between the two concerns, and the men's clothing business attached to the good will of the *Finsterwald* name which previously belonged solely to the respondent concern, would be now divided between the two Finsterwald concerns.

In the course of a carefully prepared Report, the Special Master held, in part:

> "Considering the advertising of the two companies as described above and the natural tendency of the mind to make short-cuts and remember only the most prominent word of long names, it is reasonable to conclude, and I find, that both stores are known among a large percentage of the buying public as "Finsterwald's," although the defendant's store is more generally known by the full company name than that of plaintiff.
>
> In the past there has been a considerable number of occurrences of confusion as to the identity of the two stores (360). * * * I am satisfied by the evidence, and I find, that there is a widespread impression among members of the buying public in Detroit that the stores of plaintiff and defendant are connected in business (361). * * *
>
> Insofar as the question is one of fact, I find that the sale of clothing by defendant under the name 'Finsterwald Furniture Company' is calculated to cause confusion with plaintiff and to induce a substantial percentage of purchasers to believe that they are buying clothes from the plaintiff or from one connected with it (363). * * *

> Upon consideration of all factors affecting the question, I reach the conclusion * * * that the entry of the Finsterwald Furniture Company into the clothing field under its present name involves the probability of a considerable amount of confusion which will result in the diversion of customers, actual and prospective, from plaintiff because of the similarity in names. The evidence shows that there has been considerable confusion in the past attributable solely to the common name, despite the lack of competition between the two concerns, and that there is a widespread public impression that the two stores are connected. If they are now to sell the same goods, it seems inescapable that this confusion will be greatly augmented (366)."

Likewise, the Honorable Arthur J. Tuttle, District Judge, in the course of his Opinion, held:

> "When the Finsterwald Furniture Company starts advertising and selling clothing, it is going to take away a large number of the customers and the good will of the Finsterwald Clothing Company, and bring it over into the doors and onto the books of the Finsterwald Furniture Company. It is just a necessary result. * * *
>
> There isn't any doubt in the world that, with forty years of advertising of the name Finsterwald in connection with the clothing business, when the Finsterwald Furniture Company, if it is permitted to do it, comes out in the paper and advertises clothing for sale, it is going to split up the good will of the Finsterwald Clothing Company and take some of that business away from the Clothing Company because of the confusion of the public and unjustly enrich itself as a result (398). * * *
>
> I have learned a lot of new law in recent years, but I certainly hope that the law hasn't been so changed that either by mixing up the goods sold so that the public cannot distinguish them or by mixing up the names of the concerns selling the goods in such a

> way that the public cannot tell the names apart, that one man can take advantage of that similarity of goods or similarity of names and steal the business away from his competitor to his own advantage. It seems plain to me that that is what would happen in this case, and that a court of equity ought not to permit it" (404).

Based on these facts, the lower court held that respondent was entitled, as a matter of law, to protective measures regulating petitioner's entry into the men's clothing business, so as not to unduly damage respondent. Petitioner was *not* enjoined from selling men's clothing or from competing with respondent, nor was respondent given a monopoly in the men's clothing business, as petitioner inferentially contends. Petitioner's sale of men's clothing was permitted by the decree of the lower court but restricted to sales methods that would not unreasonably deprive respondent of its established good will (391-3).

While petitioner was restrained from advertising the sale of men's clothing under the *Finsterwald* name, it was, nevertheless, permitted to exhibit and sell men's clothing within its own premises and to advise its customers that it was so doing (391-3). Petitioner was, moreover, permitted to advertise the sale of men's clothing provided that it did not feature the "Finsterwald" name, or provided it used some compound name in which the word "Finsterwald" appeared in second place, such as the name "Hadley-Finsterwald Co."

It is respectfully submitted that the decision in the instant case granting this measure of relief to respondent against petitioner's attempted usurpation of its established good-will is entirely warranted under the law of Michigan, which is in keeping with the law of unfair competition as recognized throughout this country.

III. ARGUMENT

A. THERE IS NO CONFLICT BETWEEN THE INSTANT DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS AND THE LAW OF MICHIGAN.

In urging that the decision in this case is contrary to the law of Michigan, which petitioner concedes to be controlling, petitioner cites only the case of *Young & Chaffee Furniture Company v. Chaffee Bros. Furniture Company,* 204 Mich. 293, 170 N. W. 48.

The facts and circumstances of that case are in no way comparable to the instant case. In that case, the Supreme Court of Michigan held that under the particular facts of that case, and particularly, because the names of the two concerns were substantially different, the plaintiff's name being *Young and Chaffee Furniture Company,* and the defendant's name being *Chaffee Bros. Furniture Company,* that no substantial confusion would result and that, therefore, no injunctive relief should be granted. The principle of law thus applied in that case was no different than the principle applied in the instant case. The controlling distinction is that the finding of fact in that case that no substantial confusion would result from the competition of the two concerns, was the exact opposite of the factual finding in the instant case.

Furthermore, under the decree in the instant case, the lower Court actually permitted petitioner to enter into the men's clothing business under the very same conditions as were approved in the *Chaffee* case. The decree in the instant case specifically provides that the petitioner may engage in the sale of men's clothing under a compound name which may include the name "Finsterwald" as the second word, such as the name "Hadley-Finsterwald Furniture Company" (391-2). Certainly petitioner cannot

claim that the decision in the instant case is contrary to the *Chaffee* case, when the decree of the trial Court permitted the petitioner to engage in its proposed competitive business by distinguishing its name from that of respondent in the same manner as was approved in the *Chaffee* case.

Actually, the decision of the lower Court in the instant case was grounded primarily on the law of Michigan as evidenced by two of its most recent decisions (371-2), namely: *Schwanneke v. Genesee Coal & Ice Company,* 262 Mich. 624, 247 N. W. 761 (1933); and *Bell v. Service Coal Company,* 280 Mich. 172, 273 N. W. 435 (1937). In these two cases, the Michigan Supreme Court clearly adjudged the right to injunctive relief under facts comparable to the instant case. In each of those cases the plaintiff and defendant, having substantially similar names, had been engaged in the same business for many years in nearby communities, but not in direct competition with each other. In each case it was held that when the defendant, under its own name, sought to enter plaintiff's community in direct competition with the plaintiff, having a similar name, permanent injunctive relief should be granted.

In these two cases, the Michigan Supreme Court clearly held that even though the defendant, having a name substantially similar to that of plaintiff, had a right to the use of its name in its own separate field, yet when it sought to enter into the plaintiff's field of business under that same name, and it appeared that substantial confusion would result, permanent injunctive relief should be granted. This rule adopted by the Michigan Supreme Court is neither novel nor radical, but is in accord with earlier decisions of that Court as well as the decisions of other Courts throughout this country.

Peoples Outfitting Co. v. Peoples Outlet Co., 170 Mich. 398, 136 N. W. 599 (1912);

Lamb Knit Goods v. Lamb Glove & Mitten Co., 120 Mich. 159, 78 N. W. 1072 (1899);

Dayton v. Imperial Sales, etc. Co., 195 Mich. 397, 161 N. W. 958 (1917);

Esso Inc. v. Standard Oil Co. (C. C. A. 8, 1938) 98 F. (2) 1;

Western Auto Supply Co. v. Knox (C. C. A. 10, 1937) 93 F. (2) 850;

Treager v. Gordon-Allen Ltd. (C. C. A. 9, 1934) 71 F. (2) 766;

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 60 L. Ed. 713 (1916);

United Drug Co. v. Theodore Rectanus Co., 248 U. S. 90, 63 L. Ed. 141 (1918);

Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 63 P. 480 (1900);

Pease v. Scott County Milling Co. (D. C. Mo. 1925) 5 F. (2) 524;

Regent Shoe Mfg. Co. v. Haaker, 75 Neb. 426, 106 N. W. 595 (1906);

Foster Canning Co. v. Lardan Packing Co. Inc., 17 N. Y. Supp. (2) 583 (1939);

Eastern Outfitting Co. v. Manheim, 59 Wash. 428, 110 P. 23 (1910);

Queen Anne Candy Co. v. F. W. Woolworth Co., 165 Wash. 143, 4 P. (2) 844 (1931).

It is submitted that petitioner's contention that the decision in the instant case is in conflict with the Michigan law is clearly refuted by the Michigan decisions themselves, which, in turn, are in accord with the weight of authority throughout this country.

B. THERE IS NO CONFLICT BETWEEN THE INSTANT DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

Petitioner conceded in the lower Court and in the Circuit Court of Appeals, that the law of Michigan was controlling in the decision of the instant case (364). Despite that concession, petitioner, in an effort to establish jurisdictional grounds where none in fact exist, contends in its petition that the decision in the instant case should be governed by the holdings of other Circuit Courts of Appeal, which are claimed to be in conflict with the instant decision. While we deem that to be no proper subject of inquiry in the instant case, we shall nevertheless meet that contention.

Petitioner cites in its reasons for granting Certiorari three cases from other Circuits, which petitioner claims are contrary to the instant decision (Petition, p. 9), namely:

John B. Stetson Co. v. Stephen L. Stetson Co. (C. C. A. 2, 1936) 85 Fed. (2) 586;
Gleaves v. B. W. Fishburn Co. (C. C. A. 5, 1936) 82 F. (2) 627;
Horlicks Malted Milk Corp. v. Horluck's Inc. (C. C. A. 9, 1933) 59 F. (2) 13.

We desire to point out that in every one of those cases, as in the instant case, relief was granted to the plaintiff. In the *Stetson* case the defendant was enjoined from using the name "Stetson" as a trade-name on any of its products, but was allowed to use the name "Stetson" as its corporate name, only on certain terms and conditions. The *Stetson* case is not in conflict with the instant case, where defendant likewise is allowed to sell men's clothing

subject to terms and conditions which will reasonably protect plaintiff's established good-will.

Likewise, in the other cases thus cited by petitioner, the defendant was permitted to continue its business operations, but was subjected to certain restrictions in the manner in which its name or trade-mark should be used, so that the defendant would not get the benefit of plaintiff's established good-will. A study of these cases, as well as the entire field of the law of unfair competition discloses that depending on the particular facts of the case, including the type of goods involved, the type of trade or customers, the locality of the business, the degree of similarity of the names of the concerns, the extent of past confusion, as well as many other factual elements, depends the type of relief that is granted to the plaintiff in each case.

The aforementioned cases from the Second, Fifth and Ninth Circuits cited by petitioner merely affirm the rule that depending on the facts of the particular situation, will depend the type or degree of protection accorded by the courts. There is nothing in the instant decision or in the other decisions of the Sixth Circuit Court of Appeals indicating a different rule of law. The Sixth Circuit Court of Appeals, in cases where it did not appear that substantial confusion would result, or where the need for relief was not as urgent as in the instant case, has allowed no relief or relief to a lesser degree than approved in the instant case.

Fidelity Bond & Mortgage Co. v. Fidelity Mtg. Co. (C. C. A. 6, 1926) 12 F. (2) 582;

American Washboard Co. v. Saginaw Mfg. Co. (C. C. A. 6, 1900) 103 F. 281;

G. & C. Merriam Co. v. Saalfield (C. C. A. 6, 1912) 198 F. 369;

Upjohn Co. v. Wm. S. Merrell Chem. Co. (C. C. A. 6, 1920) 269 F. 209;

The Second, Fifth and Ninth Circuits, on the other hand, have in cases more comparable to the instant case, decreed the same or even a greater degree of relief than was accorded respondent in the instant case. See:

Phillips v. Governor & Co. (C. C. A. 9, 1935) 79 F. (2) 971;
Tillman & Bendel Inc. v. Calif. Pack. Corp. (C. C. A. 9, 1933) 63 F. (2) 498 (Cert. Den. 290 U. S. 638);
Treager v. Gordon-Allen, Ltd. (C. C. A. 9, 1934) 71 F. (2) 766;
Traffey v. McIlheny Co. (C. C. A. 5, 1922) 281 F. 23;
France Milling Co. v. Washburn Crosby Co. (C. C. A. 2, 1925) 7 F. (2) 304;
Annheuser Busch, Inc. v. Budweiser Malt Prod. Co. (C. C. A. 2, 1923) 295 F. 306.

Basically, the issue raised by petitioner herein, is not whether the lower Court was justified in granting any relief to respondent, but whether the kind and extent of relief granted was justifiable under the facts of the instant case. Petitioner effectively admits that to be the basic issue, when it cites these three cases involving, not the denial of any relief against unfair competition, but the granting of lesser relief than was granted in the instant case. Furthermore, when petitioner offered in the lower Court to condition its entry into the men's clothing business upon its adoption of certain distinguishing and protective safeguards different than that directed by the Court, it likewise resolved the issue in this case into a factual question as to what safeguards were reasonably

required to protect respondent's established good-will from unfair competition by petitioner.

It is submitted that such an issue involves no conflict of decisions between the Circuit Courts of Appeal, but involves primarily a factual determination from which there is no warrant to seek review by Certiorari. It is further submitted that the relief granted respondent under the facts of the instant case is fully in accord with the well-established principles of the law of unfair competition, not only of the State of Michigan, but of the Federal Courts as well.

IV. CONCLUSION

It is submitted that the instant case involves primarily questions of fact in a purely local and private controversy, devoid of any problems of great public interest. It is further respectfully submitted that the decision was fully in accord with the law of Michigan which petitioner has conceded to be controlling in the instant case. Moreover, as we have shown, the instant decision is not in conflict with the decisions of other Circuit Courts of Appeal, but rather it is fully in accord with the prevailing authority of long established principles in the law of unfair competition.

It is respectfully submitted that the instant Petition for Certiorari does not meet the essential requirements set forth in the Rules and applicable decisions of this Honorable Court, and should, therefore, be denied.

Respectfully submitted,

JASON L. HONIGMAN,
Attorney for Finsterwald Clothing Company, Respondent.

MILTON J. MILLER,
Of Counsel.